Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
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Unbundling of Local Exchange Carrier Common Line Facilities	)	RM-8614
	)	

GTE's REPLY COMMENTS

GTE Service Corporation and its affiliated domestic telephone operating companies

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April 25, 1995

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SUMMARY

1. The FCC should not begin a narrowly focused rulemaking along the lines requested by MFS. For the sake of ensuring a fully competitive environment, GTE urges the FCC to take action in existing proceedings in order to reform interstate regulation, and to act in cooperation with state regulatory agencies in order to reform intrastate regulation aimed at ensuring universal service.

2. The comments demonstrate that the "Essential Facility" doctrine is not applicable here inasmuch as there are multiple alternatives that permit MFS to compete with LECs in providing local services, including (i) private lines, furnished under tariff by exchange carriers, which are the equivalent of the "unbundled" dialtone loop sought by MFS; (ii) such alternative media as cable television distribution facilities; and (iii) facilities being built by many firms, to permit them to provide distribution service to reach those customer sets that can be served most profitably.

3. As shown by the comments, no tying arrangement is being imposed by local exchange carriers ("LECs" or "exchange carriers"). This is demonstrated by the fact (again) that private lines, furnished under tariff by exchange carriers, are the equivalent of the "unbundled" dialtone local loop sought by MFS.

4. The FCC should not dignify by rulemaking MFS' self-serving proposal for asymmetric and anti-competitive pricing.

5. The Commission should immediately revise the interstate common line rate element rules and eliminate per-minute carrier common line charges.

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GTE's REPLY COMMENTS

GTE Service Corporation and its affiliated domestic telephone operating companies ("GTE") hereby reply to the comments filed with respect to the above captioned Petition for Rulemaking of MFS Communications Company, Inc. ("MFS") (the "*MFS Petition*").

DISCUSSION

I. RATHER THAN BEGINNING A NARROWLY FOCUSED RULEMAKING ALONG THE LINES REQUESTED BY MFS, THE COMMISSION SHOULD TAKE ACTION IN EXISTING PROCEEDINGS TO REFORM INTERSTATE REGULATION AND TO WORK IN COOPERATION WITH STATE REGULATORY AGENCIES ON REFORM OF INTRASTATE REGULATION DESIGNED TO ENSURE UNIVERSAL SERVICE.

GTE (at 2) and many other parties suggest that the *MFS Petition*'s narrow focus makes it a poor procedural vehicle for creating genuine local exchange or access service competition. Thus, Sprint (at 1) "does not believe that local exchange facility unbundling should be examined in a vacuum. Rather, other issues regarding the development of competition, access charge reform and universal service must also be addressed." MCI (at 2-3) identifies a number of "other effects which the Commission will need to examine" associated with the sale of unbundled local loops. AT&T (at 10-11) recites its list of "at least nine conditions that must be satisfied" in addition to unbundling of local dialtone service, and asks (at 16) for the Commission to "initiate a broad rulemaking." Teleport (at 5) urges the Commission to "take further and more substantial actions." Similar views are expressed by exchange carriers.[1]

As maintained by GTE (at 46-48), the *MFS Petition* is narrowly focused on obtaining a more favorable price for MFS. It ignores the complementary reforms that are needed to ensure real competition. This very point is made by LDDS (at 2), which say: "[T]he MFS Petition is too narrow because it asks the Commission to rectify an irrational access pricing scheme in only one respect, without regard to the overall discrimination embedded in that scheme." Clearly the narrow proceeding sought by MFS is, in the eyes of many commenters, not the best way to approach dealing with the "variety of complex and intertwined issues" recently referred to by Chairman Hundt.[2]

GTE shares MCI's opinion (at 3) that "the rulemaking proposed by MFS is inextricably tied to the Commission's universal service docket." In GTE's view, the most pressing issue for the Commission to address is the removal of explicit and implicit contributions that are (i) embedded in the prices for other exchange carrier services, and (ii) used to hold down the price of local exchange service. This critical matter must be considered in its total context of interrelated issues.

The argument offered by a number of comments that exchange carrier prices should be "cost-based" must be evaluated in light of the contributions LEC-offered services are required to make to assure low basic rates for residential service."[3] Real

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1 *See*, Southwestern Bell at 1; Pacific at 7-8.

2 FCC Chairman Hundt said recently: "Bringing real competition to the local exchange will require addressing a variety of complex and intertwined issues." Remarks of Chairman Reed E. Hundt, before the American Bar Association, Antitrust Section, April 6, 1995 at 4.

3 AT&T (at 11) seeks prices for all services that "reflect underlying costs." Teleport (at 4) wants "cost-based rates." CompTel asks (at 2) for "more economically efficient rate levels."

competition will not emerge from an asymmetric marketplace in which LEC competitors may purchase services from the LEC purely on the basis of incremental costs and employ those very services to compete with the exchange carrier, while LEC pricing is obliged to cover mandated subsidies for the benefit of residential customers.[4] Such a marketplace would not be competitively neutral; indeed, it would amount to a grant of market share to new entrants and a guarantee of their success. The distortions created by traditional regulatory policies toward the pricing of local services, and the resulting effects on the pricing of other LEC services, are the primary barriers to creation of a fully competitive market in which each competitor succeeds or fail on its own merits.

The best way for the Commission to promote the public interest over the private interests of any party is to act promptly in proceedings already under way in which there is an ample record to support decisive action. The Commission's *D. 94-1* proceeding[5] provides the opportunity to create interstate access regulations that match the competitive conditions already existing in that market, and to accommodate the development of competition for other services and in additional locales. Further, the *D. 80-286* proceeding[6] offers the ideal forum to act in cooperation with state regulatory

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[4] McLeod Telemanagement (at 3) points out that the price for a private line in Iowa is four times the rate for residential service. This is exactly the point presented by GTE (at 46-47): business services -- notably private line service -- are typically priced at or above cost while residential service prices are held artificially low by a host of regulatory support mechanisms. If exchange carriers were free to price both private lines and "unbundled" local dialtone loops to recover relevant costs using the same methodology and contribution factors, there would be no distinguishable difference in the pricing.

[5] *See* Price Cap Performance Review for Local Exchange Carriers, CC Docket 94-1 ("*D. 94-1*"), First Report and Order, FCC 95-132 (released April 7, 1995).

[6] *See* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286 ("*D. 80-286*"), GTE's Comments filed October 28, 1994, and GTE's Reply Comments filed December 2, 1994.

agencies to revise the existing patch-work quilt of regulatory mechanisms that distort the prices charged by exchange carriers.

Within *D. 80-286*, GTE proposes a framework that (i) will allow multiple local service providers to compete for both local and access services on the basis of their own efficiencies and merits, and (ii) will continue to ensure universal service. Adoption of the GTE framework would serve the public interest far better than any of the proposals contained in the self-serving *MFS Petition*. GTE urges the Commission to accelerate consideration of the complex and interrelated *D. 80-286* issues -- and specifically of the GTE proposal -- rather than expending resources and valuable time on the narrow proceeding sought by the *MFS Petition*.

Furthermore, separate and independent FCC action such as that proposed by the *MFS Petition* would undoubtedly embroil the Commission in years of unproductive conflict with state agencies.[7] A far better approach is to adopt NARUC's suggestion (at 10) to enter into a "collaborative and productive dialogue between the States and the FCC."

In summary: The FCC should not begin a narrowly focused rulemaking along the lines requested by MFS. For the sake of ensuring a fully competitive environment, GTE urges the FCC to take action in existing proceedings in order to reform interstate regulation, and to act in cooperation with state regulatory agencies in order to reform intrastate regulation aimed at ensuring universal service.

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[7] *See, for example*, Pennsylvania Public Utility Commission ("PaPUC") at 2-5, New York Department of Public Service ("New York DPS") at 3-6, Bell Atlantic at 2-6, National Association of Regulatory Utility Commissioners ("NARUC") at 6-10.

II. THE FACTS SHOW TO BE INVALID MFS' CLAIMS THAT EXCHANGE CARRIER LOCAL LOOPS ARE AN "ESSENTIAL FACILITY" AND THAT AN UNLAWFUL "TYING" ARRANGEMENT IS BEING IMPOSED BY EXCHANGE CARRIERS.

MFS (at 18-26) claims that "bundling of the local loop" constitutes a "tying" arrangement that comprises a *per se* violation of the antitrust laws. Further, while MFS has not in so many words alleged an illegal refusal to provide an "Essential Facility," it claims (MFS at 6-12) that the local loop is such a facility; and it is this incorrect characterization that underlies MFS' antitrust tying argument. It is shown *infra* that all elements of MFS' argument fail.

A. The "Essential Facility" doctrine requires a showing that the complaining party is being denied facilities that are not just helpful but vital.

MFS' version of the "Essential Facility" doctrine ignores the qualifications placed on it as stated by the authorities as well as the serious reservations expressed by jurists[8] and scholars.[9] *See also* NYNEX at 20-22; Ameritech at 14-17; Southwestern Bell at 12-14; and Pacific at 5. The central point is that, to make an "Essential Facility" argument, the facility being denied to the complaining party must be not just helpful but vital:

> Because the focus of the antitrust laws is always on competition, an essential facility is, at a minimum, a resource possessed by the defendant that is vital to the plaintiff's competitive viability. Obviously, the defendant[']s resource is not vital if an equivalent is available from other sources. Nor is it essential if the plaintiff can compete effectively without

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[8] *See* Ungar v. Dunkin' Donuts of America, 531 F. 2d 1211, 1222 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

[9] *See* Areeda, Phillip, and Hovenkamp, Herbert, *ANTITRUST LAW* ["*Areeda-Hovenkamp*"], Paragraph 1701.

it. The plaintiff must show that the desired resource is not just helpful but vital to his competitive viability.[10]

B. Comments show that MFS is not being denied access since the equivalent of "unbundled" local dialtone service loops is already being offered under LEC tariff; and that LEC offerings are not the only means of access to end user customers.

Commenters rebut the *MFS Petition*'s claim that there are no viable substitutes for exchange carrier local loops. The Maryland Public Service Commission ("Maryland PSC") states (at 9) flatly that "Maryland is proof to the contrary." Comments indicate Maryland is no different from the rest of the nation. GTE (at 13-19), Bell Atlantic (at 8-10), Southwestern Bell (at 15-19) and Bell South (at 6-9) demonstrate that there are numerous well-funded interexchange carriers ("IXCs"), as well as cable television and wireless firms, that are willing to risk their capital to construct facilities to replace exchange carrier loops. For example, one consortium of companies says it intends to employ cable systems for providing telecommunications service to 180 million people.[11] The Maryland PSC (at 11) says, "MFS's contention ... simply is incorrect and out of step with the recent changes in the telecommunications market."

Comments filed also show that the statements of MFS officials in state regulatory proceedings provide a stark contrast to claims in the *MFS Petition.* Southwestern Bell (at 6-8) quotes testimony from MFS in a Texas regulatory proceeding that reveals MFS'

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[10] *Areeda-Hovenkamp*, Paragraph 736.2b, 1994 Supplement at 609, *footnotes omitted.*

[11] After paying a total of $2.11 billion for Personal Communications Services spectrum in 29 markets, a partnership comprised of Sprint, TCI, Cox Enterprises, Inc., and Comcast Corporation has stated its intent to use the spectrum to help "'turn cable into local phone service' and offer about 180 million potential customers one-stop shopping for telephone and video services." "Wireless Sale Winners Include AT&T, Sprint," *The Wall Street Journal*, March 14, 1995, at A3, quoting Gary Forsee, interim chief executive officer of the Sprint-cable group.

capability to construct its own facilities, lease them from a non-LEC, or use exchange carrier private lines.[12] Further, MFS admits (*id.*) that "unbundling" of exchange carrier loops is not a prerequisite to enable it to provide local exchange services. This is entirely consistent with the comments here filed by Intermedia Communications of Florida, Inc. ("ICI") which indicates (i) the "unbundled" dialtone loop would be merely helpful, not vital; and (ii) ICI would choose to employ such loops in conjunction with its own facilities. Thus, ICI (at 1) says:

> Unbundling of loops, as proposed by MFS, **would likely assist** ICI in serving its customers in the future (once Florida authorizes local exchange competition) by making it economically and technically feasible for ICI to offer local exchange service through a combination of its own facilities and those of the dominant local exchange carriers.[13]

Further, the comments show that existing LEC private line offerings are technically and functionally the same as the "unbundled" local dialtone loops that MFS demands. Recognizing the essential need for exchange carrier testing and monitoring as part of its network responsibilities[14], GTE (at 24-29) and Bell South (at 9-15) show that there is no difference between tariffed private line offerings and the "unbundled" dialtone loops demanded by MFS. Sprint (at 5) confirms that when switching is not employed on a common line local loop, "it is functionally identical to a special access channel termination."

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[12] *See also* GTE (at 21-22) discussing MFS testimony in Pennsylvania wherein MFS admitted it has not studied the costs associated with constructing its own network.

[13] Emphasis added.

[14] *See* Southwestern Bell (at 40-41) confirming GTE's position that testing is an essential element of exchange carrier services -- regardless of the identity of the customer.

A careful review of the *MFS Petition* reveals that the real issue associated with use of private lines is not technical or functional equivalency as MFS claims. **The real issue is price.** MFS seeks dialtone local loops at a price below what exchange carriers charge like users.

In fact, MFS has the same options today as any other firm. It may choose to purchase the equivalent of "unbundled" dialtone local loops at the same price paid by other users. It may choose to risk its own capital, which is what many other firms are doing, and on a massive scale. It may choose to combine self-constructed facilities and private lines equivalent to "unbundled" dialtone local loops obtained from exchange carriers -- which is just what ICI says that it would do in the words quoted *supra*, and just what MFS is doing, as it tells state commissions.

As mentioned *supra*, to make an "Essential Facility" argument, the facility involved has to be vital. MFS has made it clear to state authorities that it does not intend to serve the entirety of any state; that it will serve just the most profitable localities and customers.[15] MFS has not made a showing that it is unable to carry out this plan. Indeed, it is busy trumpeting to the capital markets that it is already carrying out this plan.[16]

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[15] Thus, for example: (i) In Pennsylvania, MFS has stated that it only intends to serve the business community and will equip its network only with voice-grade telephonic services. MFS Intelenet of Pennsylvania, Inc., Docket No. A-310203F0002, Bell Data Request at 31 (October 26, 1994). (ii) In Illinois, MFS has said it does not intend to be a ubiquitous service provider, that its business mission is to serve the small and middle-sized business customer. Illinois Commerce Commission, Docket No. 93-0409, Direct Testimony of Alex J. Harris at 5-6.

[16] *See*, "MFS Taps Capital Markets, Accelerates Expansion", *Telecommunications Reports*, April 10, 1995, at 10, which reports MFS is planning to obtain about $500 million in capital from debt and equity markets during the second quarter; and is accelerating plans to operate in 65 U.S. metropolitan areas.

That MFS might prefer a particular kind of facility, or find it convenient, does not make it an "Essential Facility." MFS has not met its burden under antitrust law of demonstrating that it cannot compete without the "unbundled" dialtone local loops furnished at artificially low prices, which it demands.

C. Comments show that there is no "tying" arrangement being imposed.

Moreover, MFS fails to show that an unlawful tying arrangement is being imposed by exchange carriers. The functionally equivalent, non-switched private line services offered under tariff by GTE and other LECs are accompanied by LEC testing and monitoring that are an integral part of the service because they are needed to ensure efficient operation of the network. MFS is not obliged to purchase any feature or service that is not integral to the service itself. MFS has made no showing that it is being denied full access to end users, and this is being furnished with no trace of a tying arrangement.

In any case, MFS' description of a LEC "bottleneck" does not reflect current competitive reality. The LECs cannot raise prices without regard to the response of competitors. Indeed, competition among LECs and competing local providers is highly price sensitive.[17] Unlike the situation involved in the *Kodak* case[18], MFS and end users are not locked in by an up-front purchase. MFS and companies like it demonstrate daily the ease with which CAPs, IXCs and end users change suppliers.

In summary: The facts presented by GTE and other commenters show the Essential Facility doctrine has no application to MFS' demand for "unbundled" local

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[17] *See*, NYNEX at 6-7.

[18] *Eastman Kodak Co. v. Image Tech Services, Inc.*, 112 S. Ct. 2072, 2080-81 (1992), citing *Fortner Enterprises, Inc. v. United States Steel Corp.*, 395 U.S. 495 (1969).

dialtone loops because: (i) there is no "denial" in that LECs are already offering the equivalent under tariff, and (ii) the facilities demanded are not essential in that equivalents are available from other sources, (iii) MFS can compete effectively without such "unbundled" loops, and (iv) MFS has not shown -- and cannot show -- that such loops are vital to the company's competitive viability. Finally, MFS has not shown a tying arrangement is being imposed.

III. THE COMMISSION SHOULD REJECT MFS' SELF-SERVING PRICING PROPOSALS.

The *MFS Petition* proposes (at 45-46) that the Total Service Long Run Incremental Cost ("TSLRIC") on an exchange carrier loop be used as a price ceiling for "unbundled" local dialtone service loops. As an alternative, the *MFS Petition* recommends (at 46-50) an "inverse imputation" guideline that would require each "unbundled" component of local dialtone service to carry an equal proportion of overheads, and most importantly, that the sum of the prices of the unbundled components be equal to the current price of local service.

GTE (at 35-39), Southwestern Bell (at 47-55) and Ameritech (at 13-14) reveal the numerous flaws of the TSLRIC pricing proposal. Two state regulatory agencies agree. The New York DPS "has not yet found `total service' incremental cost measures that are valid for pricing...." The Maryland PSC (at 6) reveals that it has "recognized the need for a mark-up above TSLRIC to cover shared and common costs...." Maryland PSC (*id.*) believes that "such a mark-up is important for accurate cost-based ratemaking. If shared and common costs are not properly allocated to all services which are provided by a carrier, some service will have to shoulder an unfair allocation of these costs."

MFS plainly intends that exchange carrier customers (other than MFS) shoulder that unfair allocation. The Commission need not dignify such a transparent and self-serving proposal by rulemaking.

The MFS "inverse imputation" proposal is equally flawed. The *MFS Petition* itself demonstrates that an exchange carrier would incur numerous new costs and re-introduce inefficiencies eliminated with newer loop architectures to provide "unbundled" local dialtone service loops.[19] Such higher costs are not unique to an exchange carrier. Bell Atlantic (Exhibit I, at 3-4) provides testimony given in a Maryland proceeding by a non-LEC official that reveals inefficiencies and higher costs also would be experienced by a non-LEC local service provider if loop unbundling requirements were to be reciprocal. The "inverse imputation" proposal does not contemplate recovery of the costs of new equipment from the customer using those "unbundled" loops. Rather, it proposes that the exchange carrier be obliged to recover the cost from services and customers other than MFS.

The Maryland PSC (at 7) characterizes another aspect of the "inverse imputation" proposal as "an arbitrary rule," stating that the proposed requirement that the ratio of price-to-cost be the same for all unbundled elements is "unreasonable."

In summary: The FCC should reject the self-serving pricing proposals of the *MFS Petition.*

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[19] *See MFS Petition*, Appendix 2, Configuration C and D. *See also*, NYNEX (at 18-19), Sprint (at 3) and Southwestern Bell (at 55-57).

IV. THE COMMISSION SHOULD IMMEDIATELY REVISE THE INTERSTATE COMMON LINE RATE ELEMENT RULES AND ELIMINATE A PER-MINUTE CARRIER COMMON LINE CHARGE.

The interstate common line recovery method proposed by MFS would solve nothing, and it would create an unfair advantage for new local service providers. The *MFS Petition* proposes (at 43-44) that MFS pay only the End User Common Line ("EUCL") charge associated with a loop, and allow the Carrier Common Line ("CCL") revenues normally associated with that loop to be collected from IXCs serving customers that elect to obtain local service from the exchange carrier. Adoption of this proposal would create an unjustified competitive price advantage for MFS because it would mean that, while its competitors (LECs) would be obliged to charge their customers a per-minute interstate common line charge, MFS would collect only an amount equivalent to the EUCL.[20]

The *MFS Petition*, for all its deficiencies, does serve one good purpose: it re-emphasizes the need for the Commission to act promptly to revise interstate common line recovery. On this issue there is widespread agreement. Sprint (at 3-4) "supports billing the total interstate CCL allocation, on a per line basis, for each unbundled loop purchased by a LEC competitor to the purchaser of such unbundled loops."[21] Pacific Bell (at 6-8) concurs that any examination of interstate common line recovery should

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[20] *See* GTE at 33-34, Southwestern Bell at 46, and Pacific at 6-8.

[21] *See also*, GTE (at 49-50) and Southwestern Bell (at 46-47).

consider elimination of the CCL.[22] The PaPUC (at 9) cites the Commission's action in the recent Rochester Telephone Corporation Part 69 waiver request[23] and supports "FCC examination" of common line recovery methods.

As GTE noted (at 44), twenty seven states are in various stages of examining competition for local telephone services. Ameritech (at 6-7) and NYNEX (at 11) report activity along these lines in the states they serve. GTE urges the Commission to delay action no longer.

In summary: The Commission should immediately revise the interstate common line rate element rules and eliminate per-minute carrier common line charges.

Respectfully submitted,

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22 GTE does not suggest an across-the-board increase in all end user charges. A more flexible system of interstate end user charges is needed to ensure that the interstate end user charge does not cause the total rate for local service -- the sum of the local service rate and the interstate end user charge -- to exceed the market rate. A fixed, averaged interstate end user charge could impede competition in areas where costs are low, in applications where a large number of loops are provided to a single location, or when new, broadband services are involved.

23 Rochester Telephone Corporation, Petition for Waivers to Implement Its Open Market Plan, Order, FCC 95-96 (released March 7, 1995).

Certificate of Service

I, Judy R. Quinlan, hereby certify that copies of the foregoing "GTE's Reply Comments" have been mailed by first class United States mail, postage prepaid, on the 25th day of April, 1995 to all parties of record.

Judy R. Quinlan

Judy R. Quinlan